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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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Joint Application of

SCANDINAVIAN AIRLINES SYSTEM

and

ICELANDAIR

under 49 U.S.C. 41308 and 41309 for
approval of and antitrust immunity
for Cooperation Agreement

Docket OST 2000-7248 - 2

MOTION OF SCANDINAVIAN AIRLINES SYSTEM FOR
CONFIDENTIAL TREATMENT OF DOCUMENTS UNDER 14 C.F.R. 302.12

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MOTION OF SCANDINAVIAN AIRLINES SYSTEM FOR
CONFIDENTIAL TREATMENT OF DOCUMENTS UNDER 14 C.F.R. § 302.12

On April 13, 2000, Scandinavian Airlines System ("SAS" or "SK") and Flugleidir H.F.-Icelandair ("Icelandair" or "FI"), and their respective affiliates, filed a Joint Application for approval of and antitrust immunity for a Cooperation Agreement (hereinafter the "Joint Application"). Pursuant to 14 C.F.R. § 302.12, SAS files this Motion requesting that the Department of Transportation ("Department") withhold from public disclosure certain proprietary and commercially sensitive information submitted under seal in connection with the Joint Application., and that access to all such documents be limited to counsel and outside experts for interested parties who have filed an affidavit as described in 14 C.F.R. § 302.12(d)(3). The documents for which such confidential treatment is sought are specifically identified in the "Index of Confidential Documents" attached hereto.

I. SAS' CONFIDENTIAL DOCUMENTS SHOULD BE PROTECTED FROM PUBLIC DISCLOSURE

Pursuant to 14 C.F.R. § 302.12, participants in any proceeding before the Department may request that information submitted to the Department not be disclosed to the public if that information falls within one of the exemptions from disclosure in the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9) ("FOIA"). SAS submits that the information for which it seeks confidential treatment falls within exemptions 3 and 4 of FOIA.

FOIA exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Exemption 4 has been held to include "information that is not the type usually released to the public and is of the type that, if released to the public, would cause substantial harm to the competitive position of the person from whom the information was obtained." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C.Cir. 1980) ("Gulf & Western"); see also American Airlines, Inc. v. NMB, 588 F.2d 863, 871 (2nd Cir. 1978); National Parks & Conservation Ass'n. v. Kleppe, 547 F.2d 673, 684 (D.C.Cir. 1976); Joint Application of Delta and Virgin Atlantic, Order 94-5-42 (May 28, 1994); Joint Application of United and Lufthansa, Order 93-12-32 (December 18, 1993); Joint Application of Northwest and KLM, Order 93-1-11 (January 8, 1993). Exemption 4 is designed to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens' ability to confide in their government. Sterling Drug, Inc. v. Federal Trade Commission, 450 F.2d 698, 709 (D.C.Cir. 1971); Burke Energy Corp. v. Dept. of Energy, 583 F.Supp. 507, 510 (D.Kan. 1984).

In order to fall within exemption 4, the information at issue must be: (1) commercial or financial in nature; (2) obtained from a person outside the government; and (3) privileged or confidential. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C.Cir. 1983); Gulf & Western, supra, 615 F.2d at 529. The information for which confidential treatment is sought in this case clearly meets this three-part test.

With respect to the first prong of the test, the documents for which SAS seeks confidential treatment are commercial and/or financial in nature. The documents in question consist of commercially sensitive, privileged financial traffic and corporate information reflecting the internal decision-making processes of SAS. This type of information is highly proprietary and confidential, and would not normally be made available to the public. However, this information is being submitted with the Joint Application so that the Department can expeditiously evaluate the public benefit that will result from a grant of approval of and antitrust immunity for the SAS/Icelandair alliance.

With respect to the second prong of the confidentiality test, it is axiomatic that the information at issue has been “obtained from a person outside the government” (it is being provided by a private entity, SAS).

Finally, with respect to the third element of the test (the “confidential” nature of the information), the D.C. Circuit has held that commercial or financial matter is “confidential” for purposes of exemption 4 if it would not customarily be released to the public by the person from whom it was obtained and if disclosure of the information is likely to have either of the following

effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C.Cir. 1974). SAS submits that the information for which confidential treatment is sought herein clearly meets the definition of "confidential. "

As noted above, the information contained in the documents listed in the Index is information that is not normally disclosed to the public, and disclosure of this information would cause substantial harm to the competitive position of SAS. Indeed, if the documents listed in the Index were released, competitors would gain valuable insights into the internal strategies, objectives and business plans of SAS, including the strategies, objectives and plans related to the proposed SAS/Icelandair alliance. Moreover, disclosure of this information might well impair the Government's ability to obtain similar necessary information in the future. Accordingly, the documents that SAS seeks to have the Department withhold from disclosure clearly meet the definition of "confidential" required for such treatment.

Moreover, in addition to exemption 4, FOIA exemption 3 also strongly supports withholding of SAS' confidential commercial documents in this case. Exemption 3 protects from disclosure information that is specifically exempted from disclosure by a statute that either requires such information be withheld from disclosure or that establishes particular criteria for withholding certain information. See 5 U.S.C. § 552(b)(3). Pursuant to 49 U.S.C. § 40115, the Department "shall" withhold from public disclosure, among other things, information that would

“have an adverse effect on the competitive position of an air carrier in foreign air transportation.”

In the instant proceeding, release of the information for which SAS has requested confidentiality clearly would “have an adverse effect on the competitive position of [SAS] in foreign air transportation. ” Accordingly, the documents listed in the Index hereto should be withheld pursuant to both exemption 3 and exemption 4.

II. ACCESS TO THE CONFIDENTIAL DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS FOR INTERESTED PARTIES

SAS is submitting highly sensitive internal corporate documents which should be accorded limited access. Such access should be granted only to counsel and outside experts for interested parties who file affidavits pursuant to 14 C.F.R. § 302.12(d)(3) affirming that they will: (1) use the information only for purposes of participating in this proceeding; and (2) not disclose the information to anyone other than counsel or outside experts who have also filed such an affidavit.

The documents in question contain highly sensitive commercial information related to international planning and strategic decision-making by SAS, and none of this information has heretofore been released by SAS to the public. As noted above, if the documents listed in the Index were released, competitors would gain valuable insights into the internal strategies, objectives and business plans of SAS, including the strategies, objectives and plans related to the proposed SAS/Icelandair alliance.

In order to minimize the risk of harmful disclosure of this sensitive information, access

should be strictly limited. SAS is separately filing, concurrently with this Motion, five sets of this information, in sealed envelopes labeled "Confidential Treatment Requested Under 14 C.F.R. § 302.12; Access Is Limited To Counsel Or Outside Experts Who Have Filed Valid Affidavits."

The request to limit disclosure to counsel and outside experts is fully consistent with Department precedent and policy. For instance, in connection with the United/Lufthansa application for antitrust immunity cited above, the Department granted the applicants' request to limit access to certain confidential information to counsel and outside experts for interested parties who had filed appropriate affidavits. See Order 93-12-32, supra. In so limiting access to the information, the Department balanced the policies favoring disclosure of information against the competitive harm to the applicants that would result if access to confidential documents were expanded, and concluded that "the undue competitive harm to the applicants outweighs the commenters' need for expanded access to highly sensitive material" Id. at p. 5. The Department also noted that "interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials." Id.; see also Joint Application of American and Canadian International, Order 96-1-6 (January 11, 1996) at p. 3. Access to SAS' internal documents and data in this proceeding should be similarly restricted in light of the competitive harm to SAS that would result from a broader disclosure of such confidential information.

CONCLUSION

For the foregoing reasons, SAS requests that the documents listed in the attached Index of Confidential Documents be granted confidential treatment and withheld from public disclosure, and that access to such documents be limited to counsel and outside experts for interested parties that have filed appropriate affidavits.

Respectfully submitted,



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0000009- 000001 1	N/A	Improvement of SAS vis-a-vis Competition	3
0000012- 0000013	Apr 2, 1998	SAS Minutes of Meeting	2
0000014- 0000015	Oct 13, 1999	Meeting w/ Icelandair	2
0000016- 0000017	February 1998	Reporting to STONI (North America)	2
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion of Scandinavian Airlines System for Confidential Treatment of Documents Under 14 C.F.R. 302.12 on the persons on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.



Michael F. Goldman

DATED: April 19, 2000

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